No. 87-1166

In The
Supreme Court of the United States
October Term, 1987

RITA L. MENDEZ,

Petitioner,

vs.

IGNACIO MENDEZ,

Respondent.

On Writ of Certiorari to the
Florida District Court of Appeal, Third District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Whether the decisions rendered at the Trial and Appellate levels were grounded upon state law, conflicting facts and the best interests of a minor child, having no relationship to any federal or constitutional question?

2. Whether the Petitioner raised and preserved a constitutional question when neither the pleadings at the trial level nor the question presented to the Appellate Court mentioned the constitution?

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[1]Respondent wishes to state the Questions Presented differently from those which have been presented by Petitioner.

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OPINIONS BELOW

Respondent agrees with Petitioner's summary of the opinions below, with the exception that the Trial Court awarded shared parental responsibility, directing that the Respondent serve as the residential parent. He was not awarded "custody" (see Petitioner's Appendix, A-2).

JURISDICTION

The Petitioner improvidently and erroneously attempts to invoke the jurisdiction of this Court.

The failure of Petitioner to specifically raise and preserve the now alleged constitutional[2] questions in the Florida Courts has apparently placed her in the *untenable* position of arguing that the decision below was rendered by " . . . the highest Court of Florida which could be had" (Petitioner's brief, at page 2).

However, *Rule* 9.030(a)(2)(ii) of the Rules of Appellate Procedure of the State of Florida, specifically provides that the jurisdiction of the Supreme Court of Florida could be invoked when the decision of the Appellate Court "expressly construe[s] a provision of the State or Federal Constitution." Petitioner never presented the now alleged constitutional question to a Florida Court.

Thus, since Petitioner waived her right to apply to the Florida Supreme Court; *a fortiori*, there is no jurisdiction in this Court.

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STATEMENT OF THE CASE

Petitioner's summary of the facts and proceedings is incomplete. There was substantial, voluminous and impressive testimony presented to the Trial Court with respect to the parenting abilities of the father.

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[2]The Petitioner attempts to assert what she claims as her constitutional rights as opposed to what is in the best interests of her daughter.

The case tried in the State of Florida was nothing more or less than the presentation and resolution of a factual dispute with respect to what living and rearing situation would represent the best interests of the minor child, REBECCA MENDEZ. This conclusion is illustrated and punctuated by a cursory examination of the argument presented by Petitioner in the Court below, when she contended that:

"THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING THE PRIMARY PHYSICAL RESIDENCE OF THE PARTIES' MINOR CHILD TO THE HUSBAND."

Similarly, the Respondent's argument in opposition was:

"WHEN THERE IS COMPETENT EVIDENCE, ALBEIT CONFLICTING, ON THE ISSUE OF THE SELECTION OF A PRIMARY RESIDENTIAL PARENT IN A DISSOLUTION OF MARRIAGE PROCEEDING, AN APPELLATE COURT MAY NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE TRIAL COURT."

The most accurate and by far the most concise summary of the issues which were presented and determined below are set forth in the concurring opinion of the Honorable Daniel Pearson, Judge, District Court of Appeal of Florida, Third District, in his concurring opinion denying rehearing en banc (see page A-13-14 of Petitioner's Brief):

"PEARSON, DANIEL, Judge, concurring in the denial of rehearing en banc.

If, as Judge Baskin's dissent suggests the child custody issue in this case was decided on a preference

for one religion over another, it is likely that we would all agree that the case would present a question of great public importance or a question of exceptional importance. But the child custody issue was not so decided, and, the rhetoric in the dissent aside, this case involves nothing more than the quite ordinary question of whether the trial court abused its discretion in resolving conflicting testimony unrelated to the religious practices of the partries [sic] about how the best interests of the child would be served.[1]

Although the denial of rehearing en banc reflects the considered conclusion that the trial court's decision was not based upon constitutionally impermissible grounds, it is worth observing that the mother never objected in the trial court to the evidence that she now says should not have been received and considered by the court; indeed, the mother was the very party who tried to make her religious practices the focal point of the dispute. The ordinary rules by which we operate—including one requiring that error be preserved for appellate review—are not suspended merely because the point on appeal is draped with the language of the First Amendment.

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[1]The record contains evidence, for example, that the child had difficulties beyond normal sibling rivalry with the mother's other child, an older stepbrother who resides with the mother; that the stepbrother may have been physically abusive towards the child; that the paternal grandmother was a good caretaker and the maternal grandmother was not; and that, to the child's detriment, the mother was absent from the house several nights each week.

HUBBARD, NESBITT and JORGENSON, JJ., concur."

REASONS WHY THE PETITION SHOULD BE DENIED

1. Failure to Raise and Preserve the Constitutional Question Below

Neither the pleadings at the trial level nor Petitioner's argument at the Appellate level contain any reference to a specific constitutional issue. Accordingly, the issue now presented for the first time, has been waived.

If Petitioner had, which she did not, referenced the "Constitution of the United States," it would have, nevertheless, been insufficient to preserve the question for consideration by this Court. (See *Herndon v. Georgia*, 295 U.S. 441, 442-443 (1935); *Harding v. Illinois*, 196 U.S. 78, 88 (1904); *Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 248 (1902)).

Jurisdiction in this Court requires the record below to demonstrate that the constitutional question was both raised and decided by the Florida Courts. (See *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919); *Beck v. Washington*, 369 U.S. 541, 550-54 (1962)). The arguments raised below did not mention or present the constitutional question.

Significantly, in cases such as the instant case, when the record fails to demonstrate that a federal question was raised and decided by the "highest Court" which could have ruled, counsel has the option to seek and obtain a certificate from that Court setting forth the conclusion that the federal question was in fact raised and decided (*Herb v. Pitcairn*, 324 U.S. 117, 128 (1945)). No such effort was made in this case.

2. The Decisions Below Are Grounded Upon

The decisions below were based upon a state ground consisting of the selection of the Respondent as the primary residential parent of the minor child of the parties in connection with a proceeding in the Florida Court involving a dissolution of marriage. No constitutional question was presented to the Trial or Appellate Courts. Even when there is a mixed question of state and federal rights, a state Court ruling resting on an adequate state ground is a sufficient basis for denying jurisdiction. (See Harv. L. Rev. 489, 501 (1977)). Accordingly, this Court should not grant Certiorari.

3. State Court Findings of Fact are Non-Reviewable

The Courts below resolved the questions presented based upon the standard of the best interests of the child and this Court will not reexamine those findings and conclusions of fact. (See *Grayson v. Harris,* 267 U.S. 352, 358 (1925); *Portland Ry. Co., v. Railroad Commission,* 229 U.S. 397, 412 (1913); *Fry Roofing Co. v. Wood,* 344 U.S. 157, 160 (1952)).

The arguments now advanced by Petitioner would necessarily require this Court to reexamine and engage in a *de novo* factual proceeding.

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CONCLUSION

For these reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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